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IN THE

Supreme Court of the United States

October Term, 1963

No. 477

In the Matter of the Application of

JOSEPH LEWIS and ALFRED L. KLEIN,
Petitioners,

For an Order Against

JAMES E. ALLEN, Jr., Commissioner of Education of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SCHEIMAN, ALBERT & MACLEAN
Counsel for Petitioners
Time & Life Building
New York, New York 10020

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED FOR REVIEW	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS RELIED OF FOR GRANTING THE WRIT	5
CONCLUSION	6
APPENDIX	
Opinion of Special Term of the Supreme Court	7
Opinion of Appellate Division of the Supreme Court	17

TABLE OF AUTHORITIES

Cases:

Abington School District v. Schempp, 374 U. S. 203 ... 3, 5, 6

Engel, Matter of, v. Vitale, 370 U. S. 421 ... 3, 5, 6

Zorach v. Clauson, 343 U. S. 306 ... 5

Statutes:

Constitution of the United States:

First Amendment ... 3, 5, 6

Fourteenth Amendment ... 3

Education Law of the State of New York, Sec. 802, subdivision 1 ... 3

Regulations of the Commissioner of Education of the State of New York, Article XVI, subdivision 5 ... 4

28 U. S. C. §1254(3) ... 2

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York in the within action, dated June 10, 1964, affirming the order of the Appellate Division of the Supreme

Court of the State of New York, Third Judicial Department, dated September 12, 1960 which, in turn, affirmed an order of Special Term of the Supreme Court of the State of New York, Albany County, dismissing on the merits the application of petitioners to obtain an order directing the respondent Commissioner of Education to revoke his regulation interpolating the phrase "under God" into the Pledge of Allegiance to the United States flag for use in public school class and assembly rooms, upon the ground that the words of said Pledge have been unconstitutionally modified thereby.

Opinions Below

The opinion of Special Term of the Supreme Court of the State of New York is reported in 5 Misc. 2d 68. The opinion of the Appellate Division of the Supreme Court is reported at 11 App. Div. 2d 447. No opinion was rendered by the Court of Appeals.

Jurisdiction

The order of the Court of Appeals of the State of New York was dated June 10, 1964. Jurisdiction is conferred on this Court by 28 U. S. C. §1254 (3).

Questions Presented for Review

1. Whether the defendant's published recommendation to the public schools under his jurisdiction that the Pledge of Allegiance to the flag of the United States, containing

the words "under God", be used in school classrooms violates the provisions of the First Amendment to the Constitution of the United States.

2. Whether the decisions of the New York Courts are inconsistent with the determinations of this Court in *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203.

Statutes Involved

The pertinent statutory provisions are the following:

1. That portions of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, providing that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *".

2. Subdivision "1" of §802 of the Education Law of the State of New York, providing:

> "It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools."

3. Subdivision "5" of Article XVI of the Regulations of the Commissioner of Education of the State of New York, promulgated in 1956, providing:

> "Pledge to the flag. It is recommended that schools use the following pledge to the flag:
>
> 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisibl with liberty and justice for all'."

Statement

The petitioners in this proceeding, including the parents of children attending the public schools in Richmond County, New York, brought a proceeding against the New York Commissioner of Education for an order directing him to revoke a regulation promulgated by him directing the public school classroom use of a Pledge of Allegiance to the flag of the United States containing the phrase "under God". Petitioners' objections to the use of such Pledge was that it constituted a religious exercise and interfered with the parental right to dictate the religious or irreligious philosophy of children.

The respondent Commissioner of Education moved to dismiss the petition and Special Term of the New York Supreme Court granted said motion rendering an opinion appearing herein at pages 7-16. Upon petitioners' appeal, said order of dismissal was affirmed by the Appellate Division of the Supreme Court with an opinion appearing herein at pages 17-22. A subsequent appeal to the Court of

Appeals of New York resulted in a unanimous affirmance without opinion.

The opinions of the lower courts of New York were rendered before this Court decided *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203. The decision of Special Term was predicated upon the seemingly inapt conception that the First Amendment prohibits only the establishment of a State Religion and the doubtful conclusion that the recitation of the Pledge of Allegiance was not compulsory upon school children. The Appellate Division opinion likewise emphasized the absence of compulsion and relied heavily upon the accommodation doctrine expressed in *Zorach* v. *Clauson*, 343 U. S. 306 to validate the use of the challenged Pledge. Neither Special Term nor the Appellate Division gave any recognition to the contention that the grievance complained of found justification in that construction of the "establishment" clause of the First Amendment which would prohibit any governmental aid or advance to religion without regard to the question of conmpulsion.

Reasons Relied on for Granting the Writ

1. The question herein presented is of such importance as to warrant a determination by this Court because the broad and fundamental issue of separation of church and state is involved. For public school children to be required to learn and vocally express a belief in the existence of God by regularly reciting the Pledge of Allegiance recommended by respondent poses serious questions of First Amendment violations.

2. The determination of the New York courts in the instant case appears to be inconsistent with the decisions of this Court in *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203, which prohibited the conduct of religious exercises in public school classrooms. The phrase "under God" in the recommended Pledge of Allegiance expresses a religious conception. Its repeated use in the schoolrooms has the necessary effect of advancing religion and thereby appears to fail the test for First Amendment validity formulated by Mr. Justice Clark in the *Schempp* case. The seeming unconstitutionality of the respondent's recommendation is not saved by the claim that no coercion is practiced upon school children. The court decisions below which, rightly or wrongly, emphasize that conclusion do not, nevertheless, cope with this Court's rulings regarding the significance and reach of the "establishment" clause of the First Amendment and to that extent, at least, do not follow the law of the land.

Conclusion

For the reasons stated above, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

SCHEIMAN, ALBERT & MACLEAN
Counsel for Petitioners
Time & Life Building
New York, New York 10020

Opinion of Special Term of the Supreme Court

By Mr. Justice Bookstein

This is a proceeding by petitioners under subdivision 1 of section 1296 of article 78 of the Civil Practice Act to compel respondent, the Commissioner of Education of the State of New York, to perform a duty which allegedly he has failed to perform. The duty which petitioners would compel him to perform is to revoke and rescind a certain regulation allegedly enforced in the public schools of the State of New York, "requiring the use of the phrase 'under God' in the Pledge of Allegiance to the flag of the United States of America, and directing him to reestablish the use of said pledge, without that phrase".

The papers fail to indicate any demand or request for revocation or rescission prior to the commencement of this proceeding.

No statutory duty has been shown which requires respondent to rescind or revoke the regulation. So it cannot be said that respondent has failed to perform a duty imposed upon him by statute.

But petitioners contend that such duty is imposed on respondent by the First and Fourteenth Amendments to the United States Constitution and by section 3 of article I and section 4 of article XI of the New York State Constitution.

Section 802 of the Education Law, as amended by chapter 177 of the Laws of 1956, provides, in part: "1. It shall

be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag, *and a pledge of allegiance to the flag,*[1] for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such school". (Emphasis supplied.)

Respondent had, prior to the 1956 amendment, promulgated regulation 150 (par. 5) providing: "It is recommended that the schools use the following pledge to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all'."

This recommended pledge is the precise pledge enacted by the Congress of the United States. (U. S. Code, tit. 36, §172.)

On June 14, 1954, the Congress amended section 172 by inserting, between the words "Nation" and "indivisible", the words "under God". The pledge of allegiance to the flag as amended by the Congress now reads: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

---

1. Italicized words were added to section 802 by chapter 177 of the Laws of 1956.

Thereafter respondent amended paragraph 5 of regulation 150, recommending a pledge in the words enacted by the Congress.

Petitioners object to the use of the words, "under God" in the pledge of allegiance.

They have no objection to the former pledge but contend that respondent has the duty to revoke this revised regulation, deleting the words "under God" from the pledge recommended for use in the public schools and this duty petitioners say he has failed to perform.

It is clear that in making and amending regulation 150 in accordance with the Education Law and with an act of Congress, respondent *was* performing his duties.

Respondent has made a regulation pursuant to express direction of a statute of this State and in conformance with a law of the United States. How then can he be charged with failing to perform his duty?

Petitioners' contention, in final analysis, is that the present pledge of allegiance to the flag of the United States violates the First Amendment to the United States Constitution (which by the 14th Amdt. binds this State), and, also violates the New York State Constitution. Therefore, petitioners contend respondent cannot and should not perform the duties which the Legislature of the State of New York has directed him to perform, since, by amending the regulation to include the words "under God", the regulation now contravenes the First Amendment.

To sustain that contention implies respondent has not only the right, but the duty, to determine the constitutionality of an act of the State Legislature or of the Congress and to refuse to perform, where in his judgment, such act is unconstitutional.

Clearly, this is in the exclusive domain of the judiciary. It is not a function of administrative officials.

As I read the petition, no claim is asserted that either the act of the Legislature or the act of Congress above referred to violates the Constitution of the United States or of the State of New York. The petition confines its charge to the regulation promulgated by the respondent and asserts the regulation contravenes those Constitutions.

The First Amendment to the United States Constitution, so far as pertinent, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Fourteenth Amendment makes the First Amendment applicable to and binding on the State of New York.

Section 3 of article I of the New York Constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or

justify practices inconsistent with the peace or safety of this state".

Section 4 of article XI of the New York Constitution provides: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning".

Petitioners claim that freethinkers, nonbelievers, atheists and agnostics cannot be compelled to recite the present pledge of allegiance because it includes the words "under God", and such compulsion violates the aforesaid constitutional provisions.[2]

It is elementary that the First Amendment to the United States Constitution prohibits the establishment of

2. The House of Representatives Report No. 1693 83rd Cong. 2d Sess. on the bill to amend the pledge of allegiance by the inclusion of the words "under God" demonstrates that the Committee on the Judiciary considered the question of constitutionality. Its report set forth the purpose of the law and concluded the act was constitutional, emphasizing it was inspired by the fact that "At this moment of our history * * * our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own".

Concededly, that determination of constitutionality is not binding but it does signify that the matter was carefully considered.

religion and erects a wall of separation between church and State which may not and must not be breached.

In *McCollum* v. *Board of Educ.* (333 U. S. 203) the public schools were used for avowed religious instructions by members of the Protestant, Roman Catholic and Jewish faiths, although attendance at such instruction was only on request of parents. The United States Supreme Court declared the system unconstitutional because public school buildings were there being used for dissemination of religious doctrines at the taxpayers' expense.

In *Board of Educ.* v. *Barnette* (319 U. S. 624) the United States Supreme Court, at page 638, indicated approval of the Congressional enactment of the pledge of allegiance but declared the West Virginia flag salute law unconstitutional. In that instance, however, the salute to the flag was *compulsory*. The court pointed out at page 629: "Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and, if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days".

The regulation under attack here has no compulsory aspect. No penalties attach to a failure or refusal to recite the pledge. The pledge is made voluntarily and no penalties are imposed for noncompliance.

There are two general bases for attacking a statute or regulation on the grounds that it violates the First Amendment to the United States Constitution or the sections of the New York Constitution heretofore referred to:

First: Where a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting that unconstitutional requirement; Second: Where a person is deprived of property for unconstitutional purposes (such as direct or indirect tax to support a religious establishment). (See concurring opinion of Mr. Justice Jackson in the *McCollum* case, *supra*, pp. 232-233.)

Here, the second basis cannot be successfully urged. No tax or deprivation of property is involved whether or not the words "under God" are used in the pledge. We are, therefore, obliged to consider whether the first basis supports petitioners' contention.

If I properly apprehend the intent, design and purposes of the First Amendment, it was conceived to prevent and prohibit the establishment of a *State Religion*; it was not intended to prevent or prohibit the growth and development of a *Religious State.*

This concept finds judicial support in *Holy Trinity Church* v. *United States* (143 U. S. 457, 470) where the court says "this is a religious nation".

In 1951, that court said in *Zorach* v. *Clauson* (343 U. S. 306, 313): "We are a religious people whose institutions presuppose a Supreme Being".

The Declaration of Independence refers to "the Supreme judge of the world", and "the protection of Divine Providence". Lincoln, at Gettysburg, spoke of "this nation, under God". Even the preamble to the New York Constitution expresses gratitude "to Almighty God for our Freedom". Indeed, the presidential oath of office concludes, "So help me, God". By act of Congress, our coins are inscribed, "In God we trust". (U. S. Code, tit. 31, §324)

If petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg Address. Could "America" ("Protect us by thy might, Great God, our King!") be sung in a public school without offending the First Amendment? And might not the presidential oath of office have questionable constitutional status?

These questions find their answer in House Report No. 1693, note 2 (*supra*). There, the committee on judiciary notes: "The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach* v. *Clauson*, 343 U. S. 306, 312-313). In so construing the first amendment, the Court pointed out that, if this recognition of the Al-

mighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and the Honorable Court' (id., 313)".

But evidently relying on Mr. Justice Frankfurter's concurring opinion in the *McCollum* case (*supra*, p. 227), petitioners urge there is a compulsion which operates and, in substance, "requires" that a child recite the words "under God", when reciting the pledge of allegiance. In the circumstances of the *McCollum* case, Mr. Justice Frankfurter said, "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children".

Whatever the force of that argument in the circumstances of the *McCollum* case, here, the child of a non-believer may simply omit the words, "under God", in reciting the pledge. His "non-conformity", if such it be, will not in the circumstances of this case set him apart from his fellow students or bring "pressure" to bear in any real sense.

But assuming the contrary, Mr. Justice Jackson's concurring opinion in the *McCollum* case is nicely apposite. He there observed (pp. 232-233): "The complaint is that when others join and he does not, it sets him apart as a

dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground".

To grant this application "would be preferring those who believe in no religion over those who do believe". (*Zorach* v. *Clauson, supra,* p. 314.) The First Amendment does not require this.

Petitioners' right to disbelieve is guaranteed by the First Amendment, and neither they nor their children can be compelled to recite the words "under God" in the pledge of allegiance. But the First Amendment affords them no preference over those who do believe in God and who, in pledging their allegiance, choose to express that belief.

Petition dismissed upon the merits, with costs. Submit order. All papers to attorney for Respondent.

Opinion of Appellate Division of the Supreme Court

GIBSON, J. Petitioners appeal from an order which dismissed their petition seeking relief in the nature of mandamus (Civ. Prac. Act, §1296, subd. 1; cf. §1284, subd. 3) to compel respondent Commissioner of Education to rescind as constitutionally invalid a regulation recommending the use in the schools of the pledge of allegiance to the flag in the form presently in general use (Regulations of Comr. of Educ. of State of N. Y., §150, subd. 5, as amd. Sept. 24, 1954) and to re-establish the use of the pledge in its prior form. The regulation is said to contravene the First Amendment to the Constitution of the United States as well as section 3 of article I and section 4 of article XI of the Constitution of the State of New York.

None of the procedural or other objections raised by respondent seem to us to be vital but since we go directly to the merits we do not determine them.

The Commissioner of Education is charged with "the duty * * * to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools." (Education Law, §802, subd. 1.) In accordance therewith, the present amended regulation was promulgated as follows: "5. Pledge to the Flag. It is recommended that schools use the following pledge to the flag: 'I pledge allegiance

to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all'." The words "under God" did not appear in the prior regulation, in which the pledge followed the form adopted by Federal enactment (U. S. Code, tit. 36, §172), but Congress added those words to section 172 by amendment of June 14, 1954, following which and consistently therewith, the Commissioner's regulation was amended and approved by the Board of Regents in its present form.*

So far as relevant here, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and that interdiction is imposed upon the States by reason of the Fourteenth Amendment (*Everson* v. *Board of Educ.*, 330 U. S. 1; *Cantwell* v. *Connecticut*, 310 U. S. 296).

Appellants urge that in this case the contested regulation offends the constitutional provisions, first, as it involves "the use of the public schools—both physically and pedagogically—for the dissemination of purely religious dogma" and, second, as it imposes "an intolerable degree of compulsion upon the young children of non-believers * * * to listen to, learn and repeat thousands of times a religious concept which they repudiate and abhor."

---

* Differing slightly from the language of section 172 in which no comma appears in the phrase "one Nation under God", the punctuation being deemed of some significance in the opinion of the Legislative Reference Service of the Library of Congress, appended to House Report No. 1693, May 28, 1954, of the Committee on the Judiciary.

We consider first the argument of compulsion or restraint. It was held, even before the addition of the words "under God", that the flag salute could not be made compulsory so as to require the participation of the members of a religious sect who viewed the ceremony as a form of idolatry offensive to their tenets and beliefs. (*Board of Educ.* v. *Barnette,* 319 U. S. 624). Respondent freely concedes, of course, that such compulsion would infringe upon the constitutional guarantees of freedom of religion; that the freedom thus protected includes the rights of nonbelievers as of believers (cf. *Zorach* v. *Clauson,* 343 U. S. 306, 314; *Everson* v. *Board of Educ.,* 330 U. S. 1, 18, *supra*); and that the children with whom the petition is concerned cannot be compelled to recite the pledge of allegiance. His position upon that issue is stated thus: "Respondent believes that a recitation, by children of that persuasion, of the Pledge of Allegiance, omitting the words 'under God' would be in complete compliance with any rule the school could make in this respect; similarly, it would be full compliance with any such rule, if the child were not to recite at all, while remaining present, or if the child were to leave the room altogether during such recitation." Assuming for the moment that these rights conceded to dissident students be given full and complete effect, there remains no element of compulsion within the intendment of the First Amendment. Indeed, it was recently held that the imposition of similar conditions would remove all objections on constitutional grounds to the action of a local board of education requiring the recital of the so-called Regents' prayer—of religious import and significance far greater

than that of the pledge of allegiance. (*Matter of Engel* v. *Vitale,* 18 Misc 2d 659, affd. 11 AD 2d 340; and, see, *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429 as presenting no case or controversy within the appellate jurisdiction of the Supreme Court.) Upon the facts of this case, however, we find it unnecessary to remand, as was done in *Engel,* for proceedings contemplating the formal adoption of such conditions, as safeguards "intended to eliminate any element of coercion or compulsion upon the student with respect to the daily recitation of the prayer." (11 AD 2d 340, 341.) This proceeding, differing, from *Engel,* is not directed against a local or other school authority which has actually required the recital of the pledge, but is addressed to a regulation purely recommendatory. We may not assume present or future action by some school authority to effectuate the Commissioner's recommendation by means recognized by the courts and by the Commissioner as deprivative of constitutional privilege. If and when that unlikely action shall occur, it may be dealt with, directly and specifically. In this situation, therefore, we find no sound basis for any claim of coercion or pressure directed toward "an establishment of religion" or interfering with "the free exercise thereof".

Appellants' additional contention that the teaching and recitation of the pledge "involve" improper use of the schools for the dissemination of "religious dogma" seems likewise unfounded. The complete answer to this argument is to be found in the doctrine of accommodation enunciated in *Zorach* v. *Clauson* (343 U. S. 306, 313-314, *supra*). In

that case it was held (p. 312) that New York, by enacting the "released time" program to permit of religious education of school children without the school, had not "made a law respecting an establishment of religion". The court (pp. 312-313) said "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. * * * The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment."

We reach finally appellants' contention that the regulation infringes upon rights preserved by the Constitution of the State of New York. Section 3 of article I of that Constitution guarantees "free exercise and enjoyment of religious profession and worship, without discrimination or preferences"; and section 4 of article XI, also cited by appellants but of doubtful relevance here, forbids the use of public money or other property in aid of any denomina-

tional school or of any school "in which any denominational tenet or doctrine is taught". From our determination that the claim of unconstitutionality under the First Amendment cannot be sustained, it follows that the regulation does not contravene the like provisions of the State Constitution.

The order should be affirmed, with $10 costs.

BERGAN, P. J., COON, HERLIHY and REYNOLDS, JJ., concur.

Order affirmed, with $10 costs.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF IN OPPOSITION FOR RESPONDENT COMMISSIONER OF EDUCATION

CHARLES A. BRIND,
Attorney for Respondent,
Commissioner of Education
of the State of New York,
State Education Building
Albany, New York 12224.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

INDEX.

	PAGE
Jurisdiction	1
Questions Presented	2
Statutes Involved	4
Statement	9
Reasons for Opposing Issue of Writ	11
1. Decision could have been based on non-federal grounds	11
2. Proceeding is academic	12
3. Petitioners have no standing to sue	13
4. Respondent's action did not violate First Amendment	14
5. Decision is not in conflict with the Decisions of this Court	15
6. Petitioners are seeking to accomplish the impossible	18
7. Amended Pledge merely reflects and expresses a historical fact	21
Conclusion	22

CITATIONS.

CASES:

Church of the Holy Trinity v. U. S., 143 U. S. 457	19
Doremus v. Board of Education, 342 U. S. 429	13
Engel v. Vitale, 370 U. S. 421	4, 12, 15, 16, 17
Everson v. Board of Education, 330 U. S. 1	19, 20
Perkins v. Lukens Steel Co., 310 U. S. 113	14
School District of Abington Township v. Schempp and Murray v. Curlett, 374 U. S. 203	4, 15, 16, 17, 21
Zorach v. Clauson, 343 U. S. 306	19, 20

PAGE

STATUTES:

N. Y. S. C. P. L. R. Article 78 ..... 2, 3
" C. P. L. R. § 217 ..... 8, 12
" Education Law § 801 ..... 5, 19
" " " § 802, subd. 1 ..... 7, 9
Regulations of the Commissioner of Education, § 150, subd. 5 ..... 9, 10
28 U. S. C. § 1254 (3) 1
36 U. S. C. § 172 ..... 8, 9, 10, 14

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BRIEF IN OPPOSITION FOR RESPONDENT COMMISSIONER OF EDUCATION

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent prays that the Writ of Certiorari sought herein be denied and in support of said prayer submits this Brief in Opposition.

Jurisdiction

Petitioners claim that jurisdiction is conferred on this Court by 28 U. S. C. § 1254 (3).

It is respectfully pointed out that the Writ of Certiorari here sought is *not sought to be directed to a United States Court of Appeals* (such as the United States Court of Appeals for the Second Circuit) but to the Court of Appeals of the State of New York as the highest state court of the State of New York.

There has not been, nor could there be, any certification of any question of law as to which instructions are desired.

It is submitted therefore that the Writ of Certiorari here sought cannot issue on the sole and only basis on which it is sought by petitioners.

Questions Presented

1. Whether a proceeding under Article 78 of the New York State Civil Practice Act and Civil Practice Law and Rules, in the nature of mandamus, is available:

   a. Where respondent has *not* "failed to perform a duty enjoined upon [him] by law."

      (This question was *determined in favor of respondent* by Mr Justice BOOKSTEIN at New York Supreme Court, Special Term—see Appendix, pp. 7 and 9 of petition for Writ of Certiorari; the Appellate Division, Third Judicial Department, *did not determine the question*—see Appendix, p. 17 of petition; the Court of Appeals affirmed without opinion.)

   b. Where no demand was made for the revocation or rescission of the action complained of, and where the jurisdictional four-month limitation of the right to institute such a proceeding had long since expired.

(This question was *determined in favor of respondent* by Special Term—see Appendix, p. 7 of petition herein, but *was not determined* by the Appellate Division—see Appendix, p. 17 of petition.)

2. Whether a proceeding under Article 78, or any proceeding, is available where the questions raised are *entirely academic,* in that the action complained of is entirely in the nature of a recommendation and in that the record does not contain any allegation that said recommendation has been adopted by any school district.

(This question was not determined by Special Term but this aspect of the case was recognized by the Appellate Division—see Appendix, p. 20 of petition therein—and was obviously at least in part a basis for the determination of both that Court and the Court of Appeals.)

3. *Whether petitioners have standing to sue,* where the petition before the state court does not indicate that petitioners' children are actually subjected to the results of the action complained of, and where furthermore there is no evidence whatever in the record that petitioners' children are presently still in school, and if so, whether they are subjected to the results of said action.

(This question was not determined by the courts below.)

4. Whether the action of respondent in obeying a statutory duty and in so doing, obeying an Act of Congress, violated the provisions of the First Amendment to the United States Constitution.

(All courts below determined this question in favor of respondent.)

5. Whether the determination of the New York State Court of Appeals conflicts with the decisions of this Court, particularly in *Engel* (370 U. S. 421) and *Schempp* (374 U. S. 203).

(It is true that the decisions of Special Term and the Appellate Division were rendered prior to the decisions of this Court in *Engel* and *Schempp*, but the decision of the Court of Appeals was rendered well after said decisions had been handed down; said decisions were in fact extensively briefed before the Court of Appeals; the Court of Appeals determined this question in favor of respondent.)

Statutes Involved

The pertinent statutory and constitutional provisions are the following:

1. The following portion of the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *".

2. The following portions of the Declaration of Independence:

> "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happi-

ness." * * * "and for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lifes, our Fortunes and our sacred Honor."

3. The Preamble to the Constitution of the State of New York:

"We, the People, of the State of New York, grateful to Almighty God, for our Freedom, in order to secure its blessings, Do Establish This Constitution."

4. Education Law, Sections 801 and 802:

"§ 801. Courses of instruction in patriotism and citizenship and in the constitution of the United States.

1. In order to promote a spirit of patriotic and civic service and obligation and to foster in the children of the state moral and intellectual qualities which are essential in preparing to meet the obligations of citizenship in peace or in war, the regents of The University of the State of New York shall prescribe courses of instruction in patriotism and citizenship, to be maintained and followed in all the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, over the age of eight years, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools over eight years of age shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils of like age in the public schools of the city or district in which such pupils reside.

2. The regents shall prescribe courses of instruction in the history and meaning of the provisions of the constitution of the United States, to be main-

tained and followed in all of the schools of the state. The boards of education and trustees of the several cities and school districts of the state shall require instruction to be given in such courses, by the teachers employed in the schools therein. All pupils attending such schools, in the eighth and higher grades, shall attend upon such instruction.

Similar courses of instruction shall be prescribed and maintained in private schools in the state, and all pupils in such schools in grades or classes corresponding to the instruction in the eighth and higher grades of the public schools shall attend upon such courses. If such courses are not so established and maintained in a private school, attendance upon instruction in such school shall not be deemed substantially equivalent to instruction given to pupils in the public schools of the city or district in which such pupils reside.

3. The regents shall determine the subjects to be included in such courses of instruction in patriotism and citizenship and in the history and meaning of the provisions of the constitution of the United States, and the period of instruction in each of the grades in such subjects. They shall adopt rules providing for attendance upon such instruction and for such other matters as are required for carrying into effect the objects and purposes of this section. The commissioner of education shall be responsible for the enforcement of such section and shall cause to be inspected and supervise the instruction to be given in such subjects. The commissioner may, in his discretion, cause all or a portion of the public school money to be apportioned to a district or city to be withheld for failure of the school authorities of such district or city to provide instruction in such courses and to compel attendance upon such instruction, as herein prescribed, and for a noncompliance with the rules of the regents adopted as herein provided.

4. The regents shall designate a week during each year and prescribe a uniform course of exercises in the public schools of the state suitable for pupils of various ages to instill into the minds of such pupils

the purpose, meaning and importance of the bill of rights articles in the federal and state constitutions. Such exercises shall be in addition to any prescribed courses of study in the schools."

"§ 802. Instruction relating to the flag; holidays.

1. It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools.

2. It shall also be his duty to make special provisions for the observance in the public schools of Lincoln's birthday, Washington's birthday, Memorial day and Flag day, and such other legal holidays of like character as may be hereafter designated by law when the legislature makes an appropriation therefor.

3. Nothing herein contained shall be construed to authorize military instruction or drill in the public schools during school hours."

5. Education Law, Section 305, opening paragraph, subdivisions 1 and 2:

"§ 305. General powers and duties. The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

2. He shall have general supervision over all schools and institutions which are subject to the provisions of this chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school

officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control."

6. Civil Practice Law and Rules, Sections 217 and 7803:

"§ 217. Proceeding against body or officer; four months

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time such determination became final and binding upon him or at the time of such refusal, was under a disability specified in section 208, within two years after such time."

"§ 7803. Questions raised

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."

7. 36 U. S. C. § 172:

"§ 172. Pledge of allegiance to the flag; manner of delivery.

The following is designated as the pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing their headdress. Persons in uniform shall render the military salute."

8. Subdivision 5 of Section 150 of the Regulations of the Commissioner of Education:

"5. *Pledge to the flag.* It is recommended that schools use the following pledge to the flag:

'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all.'

In giving the pledge to the flag, the procedure is to render the pledge by standing with the right hand over the heart."

Statement

Title 36 of the United States Code deals with Patriotic Societies and Observances. Chapter 10 thereof covers Patriotic Customs. Section 172 of this chapter designates the text of the Pledge of Allegiance to the Flag, as well as the manner of its rendition. The text of the pledge, as contained in this section, was amended by an Act of Congress, June 14, 1954 (68 Stat. 249; Chapter 297), by adding the words "under God" after the word "Nation".

Section 802, subdivision 1, of the Education Law, for a great many years, had required the Commissioner of Education "to prepare, for the use of the public schools of the state, a program providing for a salute to the flag,

for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools". Regulations in response to this mandate had been in existence for a great many years, and were and are contained in Section 150 of the Regulations.

Shortly after the action of Congress the Commissioner of Education conformed the language of the Pledge of Allegiance, as contained in subdivision 5 of Section 150 of his Regulations, to this change in the United States Code.

The provision in the Commissioner's regulations merely *recommends* the use of the pledge as set forth in the United States Code. It does *not require* its use.

During 1956 a revision of the Flag Regulations for the New York State Schools was prepared and sent out. On page 6 of this pamphlet, Section 172 of the United States Code is quoted, and on page 10, subdivision 5 of Section 150 of the Regulations of the Commissioner of Education is also quoted. It was the distribution of this pamphlet which apparently caused petitioners to bring this proceeding, *two years after the event complained of.*

It will be noted that no school district is made a party to this proceeding, as having adopted the said recommendation and actually using the same in some manner, so that no facts as to the effect of said recommendation are before the Court.

It will be noted further that the amendment to the Regulations was made in *1954* and that the original petition herein was not verified until September 10, *1956.*

It will be noted finally that no demand was made by petitioners on respondent for discontinuance or repeal of the amendment to the Regulations.

Mr. Justice Bookstein dismissed the petition upon a lengthy opinion on the merits (Appendix, pp. 7-16 of petition herein), also noting that no "demand or request for revocation or rescission" was made "prior to the commencement of this proceeding". The Appellate Division, Third Judicial Department affirmed on the merits, but stated that "we do not determine" * * * "the procedural or other objections raised by respondent" (p. 17 of Appendix to petition).

The Court of Appeals affirmed unanimously, without opinion.

Reasons why Writ of Certiorari Should Not be Granted

1. The decision below *could have been* based entirely on good and sufficient non-federal grounds. This is so even though the Court of Appeals and the Appellate Division were content to rest their determinations on their decisions on the main issue. The Appellate Division stated:

> "None of the procedural or other objections raised by respondent seem to us to be vital but since we go directly to the merits, we do not determine them." (Appendix, p. 17 of petition.)

Thus, it is obvious that, if the Court of Appeals had agreed with petitioners on questions 4 and 5 (*supra*), the judgment itself would have had to go against petitioners, in accordance with well established rules of state law. As Mr. Justice Bookstein pointed out at Special Term (Appendix, pp. 7 and 9 of petition), it would have been necessary for

petitioners to establish that respondent had "failed to perform a duty enjoined upon [him] by law." This would have been impossible to do, since respondent followed a state statute and in so doing obeyed an Act of Congress and in order to establish this, in any event, petitioners would have had to allege and prove that a demand was made upon respondent for revocation or rescission of the action complained of. This they did not do (C. P. L. R. § 217).

2. *This entire proceeding is entirely academic.*

The action complained of consists entirely of a recommendation. There is no allegation that any school district actually adopted this recommendation. In fact, no school district is even made a party to this proceeding.

Here compare the proceeding in *Engel* (370 U. S. 421) where a school district was the respondent and the Board of Regents appeared merely as *amicus curiae* having made the recommendation for the use of the Regents Prayer. There it was the school district which had actually adopted and followed the recommendation and it was the children of petitioners in that case who had been subjected to such prayer.

Even further, if any school district had adopted the pledge as amended in 1954, it would still be necessary to show that such district had adopted that pledge as recommended by respondent, as distinguished from their adopting such pledge *directly from the United States Code* with which school district personnel may be as familiar as with the Commissioner's regulations. As the Appellate Division pointed out (Appendix, p. 20 of petition):

> "This proceeding, differing, from *Engel,* is not directed against a local or other school authority

which has actually required the recital of the pledge, but is addressed to a regulation purely recommendatory. We may not assume present or future action by some school authority to effectuate the Commissioner's recommendation by means recognized by the courts and by the Commissioner as deprivative of constitutional privilege. If and when that unlikely action shall occur, it may be dealt with, directly and specifically."

3. *Petitioners have no standing to sue in this proceeding.*

It is not alleged in the original petition in the state court that petitioners' children actually had to recite the pledge. In fact, petitioner Lewis does not allege to have children in school at all. While paragraphs 3 and 5 of such original petition allege that Alfred Klein's children are presently (1957) in attendance in the New York City School System, and that the recital of the pledge "has been the custom, tradition and regulation for the children in attendance at the public schools of this State", there is no allegation that his children were actually required to make such recital or that they were excused therefrom. If such had been the case, at that time it would have been easy enough for the petition so to allege.

In addition, however, it may well be doubtful that said children are still in school—eight years later. This, in turn, of course, raises the question which was before this Court in *Doremus* v. *Board of Education*, 342 U. S. 429, where the appeal to this Court was denied because the children in question had graduated from school and, consequently, the Court held (Justices Douglas, Reed, and Burton dissenting) that appellant had lost his justiciable interest in the matter.

Petitioners' lack of standing to sue rests "upon reasons deeply rooted in the Constitutional divisions of authority in our System of Government and the impropriety of judicial interpretation of law at the instance of those who show no more than a mere possible injury to the public."

Perkins v. *Lukens Steel Co.*, 310 U. S. 113, 132.

4. *Respondent's action did not violate the provisions of the First Amendment to the United States Constitution.*

Respondent obeyed a State law under which he must prepare a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be determined by him to be expedient.

In addition, as chief executive officer of the Board of Regents of the University of the State of New York he also must prescribe courses of instruction in patriotism and citizenship, in the history, meaning, significance and effect of the provisions of the Constitution of the United States, the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto.

In acquitting himself of these duties he obeyed, as he had to, the amendment made by the 1954 Act of Congress which added the words "under God" to the pledge of allegiance (36 U. S. C. § 172).

He cannot excise certain parts of the materials for the teaching of which he is responsible under statute and Act of Congress and teach only an expurgated version thereof. He cannot eliminate the words "under God" from the teaching of the Gettysburg Address and be true to the history of the United States, *i.e.* to his statutory duty.

5. *The decision of the Court of Appeals is not in conflict with the decision of this Court in Engel and Schempp.*

In the former case, this Court found that the Regents Prayer was a "religious exercise" (pp. 437 to 439, fn. on pp. 440, 442). It was there held that the Regents Prayer was "a part of a governmental program to further religious beliefs"; "part of the religious program carried on by government" (p. 425); "is a religious activity" (p. 424).

Thus, the question is posed as to the nature of the amended pledge of allegiance in the cause at bar. Is it a religious exercise, or is it something else?

The test according to Mr. Justice CLARK, writing for the Court in *Schempp*, on page 222 is as follows:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion, then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Or, in the words of the concurring opinion of Mr. Justice BRENNAN (pp. 294, 295):

> "What the Framers meant to foreclose, and what our decisions under the Establishment clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert reli-

> gious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not in my judgment be deemed to violate the Establishment Clause. Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society."

Measured by these tests, it is clear that the amended pledge of allegiance does not fall into the category of the impermissive. The addition of the words "under God" does not in the light of the history of this nation convert the Pledge of Allegiance into an "essentially religious exercise".

On the contrary, in the words of the majority opinion in *Schempp*, the Pledge of Allegiance is essentially used "as a reference for the teaching of secular subjects" (p. 224).

As Judge Dye pointed out in *Engel* (10 N. Y. 2d 191):

> "The Pledge of Allegiance was neither designed nor intended for other than a patriotic purpose."

Mr. Justice BRENNAN specifically refers to the recitation of the revised pledge in *Schempp* (374 U. S. 303, 304). He categorizes it among:

> "F. Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.— * * * The truth is that we have simply interwoven [the motto 'In God We Trust'] * * * so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.
>
> "This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious

purpose or meaning. *The reference to divinity in the revised pledge of allegiance for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God'. Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.*" (Emphasis supplied.)

Again, specifically referring to the Pledge of Allegiance (pp. 280 and 281), Mr. Justice BRENNAN in discussing the propriety of "the use of religious means to achieve secular ends where non-religious means will suffice" says:

> "It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, *daily recitation of the Pledge of Allegiance*, or even the observance of a moment of reverent silence at the opening of class, *may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.*" (Emphasis supplied.)

Mr. Justice GOLDBERG perhaps best sums up respondent's position in his concurring opinion in *Schempp* (374 U. S. 307, 308):

> "And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause. As the Court declared only last Term in *Engel* v. *Vitale*, 370 U. S. 421, 435, n. 21:
>
> > 'There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the com-

> poser's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. *Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State * * * has sponsored in this instance.'*
>
> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow." (Emphasis supplied.)

6. What petitioners are here seeking to accomplish is actually completely impossible. They wish to "protect" children of their persuasion from all exposure to the fact that the great majority of the citizens of this country have throughout its history acknowledged, and do now acknowledge the existence of a Divine Being. This fact is documented and manifested in a great many diverse ways. "In God we trust" appears on our coins. *How would petitioners prevent the little ones from noticing that inscription on the pennies and nickles they are given to buy candy or gum?* Officials and official bodies, such as the president of the United States, the Congress of the United States, all State Legislature and our courts, have continuously invoked the Deity before and after the transaction of official business. Christmas and Easter, as well as Sunday, are official holidays, as is Thanksgiving Day established by Presidential Proclamation. *How would petitioners prevent the little ones from noticing that there is a special significance to Christmas, to Easter, and to Sunday?* The oath used in judicial process and the Presidential Oath of Office are but a

further indication that the Supreme Being is part of the warp and woof of our national life. The United States Supreme Court itself starts all its sessions with such an invocation ("God save the United States and this Honorable Court"); "the mass of organic utterances proclaims that ours is a religious Nation" (143 U. S. 457)*; "We are a religious people whose institutions presuppose a supreme being" (343 U. S. 306)**. Petitioners refer to the *Everson* case (330 U. S. 1) but fail to add that in that case the court declared valid the transportation of pupils from and to religious schools.

The court there states on page 18: "State power is no more to be used as to handicap religions than it is to favor them". It is submitted that respondent's action neither handicaps nor favors any religion. It merely adds language which has long been part of our national heritage.

The New York State Education Law, Section 801 and other provisions thereof *require* that the great organic documents (listing specifically, among others, the Declaration of Independence) be taught in all the schools of the state, public and private. Lincoln's Gettysburg Address, which is one of the basic historic documents which must be taught as part of our national history and heritage, refers expressly to "this Nation under God".

Would petitioners have the Nation's schools teach our youth that Lincoln never said that? Or would they omit the Gettysburg Address altogether? To do so, would in the words of the Court of Appeals (10 N. Y. 2d 180), indeed "be in defiance of all American history".

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* *Church of the Holy Trinity* v. U. S.

** *Zorach* v. *Clauson.*

Both under the *Everson* case and the 1939 amendment to the New York State Constitution, transportation of pupils at public expense to religious schools is prevalent throughout the State, of which fact the children obviously are aware. The released time program has been held to be constitutional in the *Zorach* case (343 U. S. 306) and *pupils are aware of this when some of them leave for this purpose and later return. Children cannot help but notice the fact that churches and synagogues exist and people stream to them at certain times.*

Thus, it is obvious that the child at a very early age is bound to come in contact with the word and concept of God and their connection with our life, history and national heritage.

It is obviously impossible to eliminate this contact and knowledge from the child's life.

We would need to reissue all our coins, alter all historic and constitutional documents, all text books and falsify history in order to achieve such a result. It cannot be reasonably argued that petitioners are constitutionally entitled even to an attempt in this direction. *It is submitted that the addition of these words to the Pledge of Allegiance does not in any way alter the influences to which the growing young American is subjected.*

Petitioners' argument that teachers may be asked, because of this addition, to explain the nature and meaning of God, is merely speculation. If speculate we must, we may more reasonably assume that the question as to the nature of God will have been explained to the child long before he enters school and even if it hasn't, it is only reasonable to assume that any sensible teacher will refer the child to his parents for an answer.

7. The amended pledge merely acknowledges that, in the words of Justice CLARK in *Schempp* (374 U. S. 212):

> "It is true that religion has been closely identified with our history and government."

It also acknowledges that today (1962), as Justice CLARK further points out in *Schempp*, 97% of our population either have actual church membership or at least profess some religion or religious beliefs of one kind or another:

> "Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of Census, U. S. Department of Commerce Statistical Abstract of the United States, 48 (83d. ed. 1962), while less than 3% profess no religion whatever." *Id.*, at p. 46." (374 U. S. 213.)

In fact, an acknowledgment or invocation of the Supreme Power is contained in one form or another, in every state constitution in the United States, in the Declaration of Independence and in the Preamble to the Constitution of the United States.

While the rights of minorities of all kinds must, of course, be scrupulously respected and safeguarded, nevertheless, these basic facts of our national life and history cannot and should not be kept from the growing child. Thus, the use of the amended pledge, *if a school district indeed wished to adopt respondent's recommendation*,

> "merely recognize[s] the historical fact that our nation was believed to have been founded 'under God'. Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address which contains an allusion to the same historical fact." (374 U. S. 304; Emphasis supplied.)

Conclusion

For all the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari herein should be denied

Respectfully submitted,

CHARLES A. BRIND
Attorney for Respondent
Commissioner of Education
of the State of New York
Office & P. O. Address
State Education Building
Albany, New York 12224

Of Counsel
JOHN P. JEHU
ELIZABETH M. EASTMAN
GEORGE B. FARRINGTON
LOUIS H. J. WELCH

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 477

IN THE MATTER OF THE APPLICATION OF
JOSEPH LEWIS AND ALFRED L. KLEIN,
Petitioners,

FOR AN ORDER AGAINST

JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

BRIEF OF THE ATTORNEY GENERAL OF MARYLAND, AMICUS CURIAE

In which the several States shown herein have joined through their respective Attorneys General.

THOMAS B. FINAN,
Attorney General of Maryland,

DAVID T. MASON,
Assistant Attorney General of Maryland,
Suite 1200, One Charles Center,
Baltimore, Maryland 21201.

The Daily Record Co., Baltimore 3, Md.

JOINING IN THE BRIEF

Honorable Richmond M. Flowers, Attorney General of Alabama.
Honorable Robert W. Pickrell, Attorney General of Arizona.
Honorable Bruce Bennett, Attorney General of Arkansas.
Honorable Duke W. Dunbar, Attorney General of Colorado.
Honorable David P. Buckson, Attorney General of Delaware.
Honorable James W. Kynes, Jr., Attorney General of Florida.
Honorable Eugene Cook, Attorney General of Georgia.
Honorable Bert T. Kobayashi, Attorney General of Hawaii.
Honorable Allan G. Shepard, Attorney General of Idaho.
Honorable William M. Ferguson, Attorney General of Kansas.
Honorable Robert Matthews, Attorney General of Kentucky.
Honorable Jack P. F. Gremillion, Attorney General of Louisiana.
Honorable Frank E. Hancock, Attorney General of Maine.
Honorable Joe T. Patterson, Attorney General of Mississippi.
Honorable Forrest H. Anderson, Attorney General of Montana.
Honorable William Maynard, Attorney General of New Hampshire.
Honorable T. Wade Bruton, Attorney General of North Carolina.
Honorable Helgi Johanneson, Attorney General of North Dakota.
Honorable Walter E. Alessandroni, Attorney General of Pennsylvania.
Honorable J. Joseph Nugent, Attorney General of Rhode Island.
Honorable Daniel R. McLeod, Attorney General of South Carolina.
Honorable Frank L. Farrar, Attorney General of South Dakota.
Honorable George F. McCanless, Attorney General of Tennessee.
Honorable Waggoner Carr, Attorney General of Texas.
Honorable A. Pratt Kesler, Attorney General of Utah.
Honorable Charles E. Gibson, Jr., Attorney General of Vermont.
Honorable Robert Y. Button, Attorney General of Virginia.
Honorable C. Donald Robertson, Attorney General of West Virginia
Honorable John F. Raper, Attorney General of Wyoming

INDEX

Table of Contents

	PAGE
Interest of the State of Maryland	1
Jurisdiction	3
Question Presented	3
Constitutional and Statutory Provisions Involved	3
Statement of the Case	4
Reasons Why Writ of Certiorari Should Not Be Granted	4
Conclusion	9

Table of Citations

Cases

Engel v. Vitale, 370 U.S. 421	4, 5, 6, 8
School District of Abington Township v. Schempp, 374 U.S. 203	5, 6, 7, 8
Zorach v. Clauson, 343 U.S. 306, 313	8

Statutes

Annotated Code of Maryland (1957 Edition and 1964 Supp.):	
Article 77—	
Section 98	2
Section 98A	2
Section 247	2, 6
Constitution of the United States:	
First Amendment	3, 4, 5, 6, 7, 8
Education Law of the State of New York:	
Section 802, subsection 1	4

PAGE

United States Code Annotated:
Title 28—
Section 1254(3) 3
Supreme Court Rules, Rule 27, 1(d) 3
Title 36—
Section 172 ..... 3, 5

Miscellaneous

House of Representatives Report No. 1693, 83rd Congress, 2nd Session, Page 3 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 477

IN THE MATTER OF THE APPLICATION OF
JOSEPH LEWIS AND ALFRED L. KLEIN,
Petitioners,

FOR AN ORDER AGAINST

JAMES E. ALLEN, JR., COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,
Respondent.

BRIEF OF THE ATTORNEY GENERAL OF MARYLAND, AMICUS CURIAE

In which the several States shown herein have joined through their respective Attorneys General.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This Brief is submitted on behalf of the State of Maryland in opposition to the granting of the Writ of Certiorari sought herein.

INTEREST OF THE STATE OF MARYLAND

There are twenty-three counties in the State of Maryland in addition to the separate political subdivision known as Baltimore City. Each county and Baltimore City has a governing Board of Education whose duty it is to supervise

the education and instruction of the children in its respective county or city. There are three Maryland statutes with statewide applicability that are pertinent to the issues raised by the Petitioners. Of particular relevance is Article 77, Section 247 of the Annotated Code of Maryland (1957 Edition) which reads as follows:

> "It shall be the duty of the board of education of each and every county in the State of Maryland, and of the Board of Education for Baltimore City, in the State of Maryland, to cause to have displayed a flag of the United States of America upon every public school building within their respective jurisdictions while said schools are in session, and to that end shall make all necessary purchase of flags, staffs and appliances therefor and establish rules and regulations for the proper custody, care and display of the flag in said schools; and it shall be the duty of said boards of education to prepare for the use of the public schools of the State a programme providing for the salute to the flag, and such other patriotic exercises from time to time as may be deemed by them to be expedient, and under such regulations and instruction as may best meet the various requirements of the different grades in such schools; all to the end that the love of liberty and democracy, signified in the devotion of all true and patriotic Americans to their flag and to their country, shall be instilled in the hearts and minds of the youth of America."

The other relevant statutes are Article 77, Section 98 of the Code which refers to the singing of the National Anthem, and Article 77, Section 98A which relates to a period of silent meditation. In addition, the aforesaid subdivisions of the State have rules and regulations regarding appropriate patriotic exercises, including the Pledge of Allegiance to the Flag of the United States.

In view of the state and national interests in this case, and the myriad implications of the issues raised for resolu-

tion by this Court, the Attorneys General of the states listed on the inside cover of this Brief have joined in Opposition to the Petition for Certiorari.

JURISDICTION

Petitioners herein invoked the jurisdiction of the Court under Title 28 U.S.C.A., Section 1254(3). This Brief of the State of Maryland as amicus curiae is filed under the authority of Supreme Court Rules, Title 28 U.S.C.A., Rule 27, 1,(d).

QUESTION PRESENTED

Whether the Respondent's recommendation to the public schools under his jurisdiction to use the Pledge of Allegiance to the flag of the United States, containing the words "under God" violates the provisions of the First Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The following portion of the First Amendment to the Constitution of the United States:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *"

2. Title 36 U.S.C.A., Section 172, Pledge of Allegiance to the flag; manner of delivery:

> "The following is designated as the pledge of allegiance to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.' Such pledge should be rendered by standing with the right hand over the heart. However, civilians will always show full respect to the flag when the pledge is given by merely stand-

ing at attention, men removing their headdress. Persons in uniform shall render the military salute."

3. Subsection 1 of Section 802 of the Education Law of the State of New York:

"1. It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools."

STATEMENT OF THE CASE

The Attorney General of Maryland adopts the Respondent's Statement of the Case as presented on pages 9, 10 and 11 of his Brief.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

Although there may well be, as urged by Respondent, procedural disabilities that would preclude the granting of this writ to the Petitioners, the main thrust of this Brief in opposition to the granting of the writ is addressed to the narrow constitutional issue of whether the recital of the Pledge of Allegiance to the Flag, *supra*, in public schools, contravenes the Establishment Clause of the First Amendment of the Constitution of the United States.

In *Engel v. Vitale*, 370 U.S. 421 this Court held that the daily recital of the state composed Regent's Prayer in public school classrooms was a religious exercise and constituted an establishment of religion in violation of the First Amendment to the Constitution.

In *School District of Abington Township v. Schempp*, 374 U.S. 203 this Court held that the reading of the Bible and the recitation of the Lord's Prayer in public schools were religious exercises and violated the mandate of the First Amendment to the Constitution prohibiting the establishment of a religion.

The Petitioners argue that the classroom recitation of the Pledge of Allegiance containing the phrase "under God" is also a religious exercise which violates the Establishment Clause of the First Amendment. Petitioners rely chiefly on *Engel* and *Schempp*, *supra*, as authorities in support of their argument.

Although the argument of the Petitioners may have surface plausibility, it cannot survive close examination, being predicated on the false premise that the Pledge of Allegiance is a religious exercise, as opposed to a patriotic ceremony.

Title 36, Section 172 of the United States Code, *supra*, relates to patriotic observances and customs, including personal conduct during the playing of the National Anthem, manner of delivery of the Pledge of Allegiance to the Flag, and display of, and respect for, the flag.

A reading of the legislative history and purpose of this Act, clearly shows that the Pledge of Allegiance, in its historical frame of reference, was never intended as a religious exercise but was designed essentially for patriotic purposes. See *e.g.*, the House Report* recommending the addition of the words "under God" to the Pledge of Allegiance. This report states, *inter alia*, that the words "under God" were not in conflict with the First Amend-

* House Representatives Report No. 1693, 83rd Congress 2nd Session, Page 3.

ment of the Constitution but recognized "only the guidance of God in our national affairs."

It is too clear for argument that the intent and purpose of Congress and the several states in enacting the Pledge of Allegiance, was to promote a spirit of patriotic and civic pride and to foster intellectual and moral qualities so essential in preparing the youth of this great nation to meet the responsibilities and obligations of citizenship.

The congressional and legislative intent in the enactment of the Pledge of Allegiance, is perhaps best expressed by that part of Article 77, Section 247 of the Maryland Code, *supra*, which states:

> "* * * it shall be the duty of said boards of education to prepare for the use of the public schools of the State a programme providing for the salute to the flag, and such other patriotic exercise * * * all to the end that the love of liberty and democracy, signified in the devotion of all true and patriotic Americans to their flag and to their country, shall be instilled in the hearts and minds of the youth of America."

A careful reading of *Engel* and *Schempp*, *supra*, clearly suggests that Petitioners' reliance on them is completely misplaced. There is nothing in either case to intimate or suggest that the use of the words "under God" in the Pledge of Allegiance constitutes an establishment of a religion or otherwise violates the First Amendment to the Constitution. On the contrary, these cases suggest an opposite meaning.

In *Engel*, *supra*, at page 435, Footnote 21, this Court said:

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain

references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance." 370 U.S. 421, 436, 8 L. Ed. 2d 601, 610.

In *Schempp, supra*, Mr. Justice Brennan in his extended and luminously expounded concurring opinion, specifically suggested, *inter alia*, that the use of the Pledge of Allegiance may not be that type of involvement which the First Amendment to the Constitution prohibits. He observed at pages 303, 304:

"This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded 'under God.' Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact." 374 U.S. 203, 303-304, 10 L. Ed. 2d 844, 903-904.

Mr. Justice Brennan again referred, *inter alia*, to the Pledge of Allegiance at pages 281-282:

"It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the

community or the proper degree of separation between the spheres of religion and government." 374 U.S. 203, 281-282, 10 L. Ed. 2d 844, 891-892.

Mr. Justice Goldberg, in his concurring opinion, also observed:

> "And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause." 374 U.S. 203, 307, 10 L. Ed. 2d 844, 906.

It is apparent from the majority opinion in *Engel, supra*, and the concurring opinions of Mr. Justice Brennan and Mr. Justice Goldberg in *Schempp, supra*, that the use of the Pledge of Allegiance in public schools is not an impermissible involvement by the State in religion, and that said pledge is not within the constitutional orbit of the First Amendment.

If we are misreading the import and reach of these opinions, and Petitioners' attack on the use of the Pledge of Allegiance in public schools is sustained, it would, with devastating impact, give further encouragement to those whose unrelenting and dedicated effort it is to remove from our public life every vestige of our religious heritage. This thought is intolerable, and we suggest that the Court *lay to rest* further efforts to establish a *religion of secularism* in our schools, by denying this petition and reaffirming the fact that:

> "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313, 96 L. Ed. 954, 962.

CONCLUSION

For the reasons stated herein and for the reasons set forth in the Respondent's Brief, it is respectfully submitted that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

DAVID T. MASON,
Assistant Attorney General of Maryland,
Suite 1200, One Charles Center,
Baltimore, Maryland 21201.